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Supreme Court, U.S.
FILED
JAN 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1084

In The

Supreme Court of the United States

October Term, 1988

DR. E.G. FISCHER,

Petitioner,

vs.

BAR HARBOR BANKING & TRUST COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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DR. E.G. FISCHER,

Petitioner,

vs.

BAR HARBOR BANKING & TRUST COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Bar Harbor Banking & Trust Company respectfully submits that this Court should deny the petition for writ of certiorari seeking review of the First Circuit's opinion in this case. That opinion is reported at 857 F.2d 4. The Petition was received by counsel for the respondent on January 3, 1989.

STATEMENT OF THE CASE

Petitioner and Respondent owned conflicting interests in a sailboat under construction. Petitioner's interest

arose from a contract to purchase the boat upon completion, under which petitioner had made partial payments of the purchase price, and from a subordinate security interest granted to him by the builder. Respondent's interest arose from a series of loans to the boat builder secured by work in progress, including the boat that petitioner had contracted to purchase. Respondent had recorded its claim in the usual form of filings with the Secretary of State of Maine pursuant to the Maine Commercial Code on March 12 and June 15, 1984; petitioner similarly filed on June 18, 1984.

During July, 1984, the boat builder informed petitioner that it was ceasing operations because of financial difficulties. On July 25, 1984, the boat builder gave petitioner a bill of sale for the unfinished boat, subject to respondent's claim. Thereafter petitioner took possession, had the boat finished elsewhere, and removed the boat to Rhode Island in August, 1984. On May 24, 1985, petitioner commenced a civil action against respondent in the District Court for the District of Maine, averring claims for slander of title and intentional infliction of emotional distress. After some confusion at the office of the Maine Secretary of State, the security interest of the Bank was terminated of record in October, 1985. Termination was again evidenced by a release delivered to plaintiff.

On September, 29, 1986, the United States Magistrate recommended granting the Respondent's motion for summary judgment. In his objections to the Magistrate's recommended decision petitioner argued that the Maine Supreme Court should be asked to define a cause of action for slander of title, including the special damages

required and the defense of qualified privilege. On September 27, 1987, the District Judge determined that certification of the issues suggested by petitioner was unnecessary and granted Respondent's motion for summary judgment.

The District Judge, a Maine lawyer with over thirty years of practice as a lawyer, bankruptcy referee and judge, and district judge in that jurisdiction, held that, although direct Maine authority was lacking, the Maine courts would recognize the tort of slander of title and would also recognize the well established privilege of a rival claimant. The District Court found that respondent was entitled to the privilege and that petitioner had not shown any possibility of overcoming the privilege at a trial. The District Court's judgment was affirmed by a panel of the Court of Appeals that included the Court's Maine appointee, another Maine lawyer of over thirty years experience. Although questioning summary judgment on familiar evidentiary grounds, the First Circuit's Maine judge did not fault the District Court's exposition of the controlling principles of substantive law.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. Because The District Court's Decision Not To Certify Was Plainly Correct, Neither Of The Decisions Below Raises Any Question Concerning The Proper Scope Of A Discretion To Certify.

The questions sought to be certified at the District Court level involved aspects of the petitioner's slander of

title claim. The petition focuses chiefly on the District Court's refusal to certify a question concerning the privilege of a rival claimant, on which respondent was awarded summary judgment. Although the petition does not set out the question, presumably petitioner had in mind determining whether the privilege would be recognized in Maine and ascertaining the showing required to overcome it. The District Court thus was asked to certify questions as to the Maine Court's acceptance of general American common law principles recognized in every jurisdiction that has considered them and rejected nowhere.

The questions proposed for certification were not novel questions of local doctrine, *see Delehanty v. Hinckley,* 845 F.2d 1069 (D.C. Cir. 1986), or matters as to which there is considerable disagreement among American jurisdictions, *see Eli Lilly and Co. v. Home Ins. Co.,* 764 F.2d 876 (D.C. Cir. 1985), or intensely local questions important to a wide spectrum of state government activities, *see Elkins v. Moreno,* 435 U.S. 647 (1978), or a question involving a developing area of the law presented to a distant court lacking regular contact with the lex loci, as was the case in *Lehman Brothers v. Schein,* 416 U.S. 386 (1974). Particularly to the experienced District Judge, certification was not required because the course the state courts would take was reasonably clear. *Bi-Rite Enterprises, Inc., v. Bruce Miner Co., Inc.,* 757 F.2d 440 (1st. Cir. 1985); *State of Florida ex rel. Shevin v. Exxon Corp.,* 526 F.2d 1266, rehearing den. 529 F.2d 523 (5th Cir. 1976), cert. den. 429 U.S. 829. The Federal Court therefore had no reason to shun its responsibility to decide all issues before it. *Shakopee Mdewakanton Sioux Community v. City of Prior Lake, Minn.,* 771 F.2d 1153 (8th Cir. 1985), cert. den. 475 U.S. 1011.

Without really tackling the underlying substantive issue, the petitioner tries to suggest some infirmity in the District Court's conclusion that Maine law recognizes the privilege of a rival claimant as an affirmative defense to a claim of slander of title. He characterizes the Magistrate's proposed findings and recommendations as adopting minority views, accuses Professor Prosser of inventing "the doctrine" for the Restatement of Torts, and asserts that only one case in this century has recognized "such a doctrine". The invention is in Petitioner's argument. The privilege of a rival claimant is far from the orphan petitioner t ies to make out.

In addition to the Restatement of Torts, the Restatement of Torts, 2d, and the Arkansas case cited at page 9 of the petition, Courts in the States of New Jersey, *Bogosian v. First Nat. Bank* of *Millburn*, 133 N.J. Eq. 404, 32 A.2d 585, 586 (1943); *Rogers Carl Corp. v. Moran*, 246 A.2d 750, 753 (N.J. Super. 1968); Connecticut, *Bleich v. Ortiz*, 493 A.2d 236, 238 (Conn. 1985); Pennsylvania, *Forman v. Cheltenham National Bank*, 502 A.2d 686, 688 (Pa. Super. 1985); Alabama, *Alabama Power Co. v. Laney*, 428 So.2d 21, 22-23 (Ala. 1983); Florida, *Allington Towers Condominium North, Inc. v. Ellingwood Towers North, Inc.*, 415 So.2d 118, 119 (Fla. Dist. Ct. App. 1982); Maryland, *Dixon v. The Process Corporation*, 416 A.2d 1295, 1300 (Md. Ct. Spec. App. 1980); California, *Spencer v. Harmon Enterprises, Inc.*, 44 Cal.Rptr. 683, 689 (Cal. Dist. Ct. App. 1965); North Carolina, *Cardon v. McConnell*, 120 N.C. 461, 27 S.E. 109 (1897); and Oklahoma, *Keiser v. Kile*, 166 Okl. 41, 26 P.2d 194, 195 (1933), have not only recognized but approved

the privilege. *See also Kemart Corp. v. Printing Arts Research Lab, Inc.*, 146 F. Supp. 21, 23, aff'd. 269 F.2d 375, cert. den. 361 U.S. 893 (S. D. Cal. 1956).

The privilege on its face seems almost a self-evident necessity if disputes over conflicting interests in property are to be resolved in the courts rather than at the barricades, since the underlying tort may arise from the filing of a required notice of claim in a public office. In countless everyday transactions nowadays one either records a mortgage or a financing statement – risking litigation like this if petitioner is correct – or abandons a security interest to other creditors or to a trustee in bankruptcy. Actually, the privilege of a rival claimant is only an extension of a markedly similar privilege recognized in personal defamation actions; that is the privilege to protect an important interest of the defendant-publisher. Restatement of Torts, 2d, Sec. 647, comments a, b.

The Maine court has recognized comparable privileges sufficiently often to leave any reasonable observer confident of the outcome if the privilege of a rival claimant were presented to it. *See Saunders v. Van Pelt*, 497 A.2d 1121 (Me. 1985); *Packard v. Central Maine Power Company*, 477 A.2d 264 (Me. 1984); *Roche v. Egan*, 433 A.2d. 757 (Me. 1981); *Parker v. Kirkpatrick*, 124 Me. 181, 126 A. 825 (1924); *Hodgkins v. Gallagher*, 122 Me. 112, 119 A. 68 (1919); *Elms v. Crane*, 118 Me. 261, 107 A. 852 (1919). Moreover, the Maine Court does not share Petitioner's scorn for the Restatement of Torts. It has regularly cited and relied on the Restatement as an authority. *See Michaud v. Town of Livermore Falls*, 381 A.2d 1110, 1113-4 (Me. 1978); *Nelson v. Maine Times*, 373 A. 2d 1221, 1223 (Me. 1977); *Estate of Berthiaume v. Pratt, M.D.*, 365 A.2d 792, 795 (Me. 1976). Needless to say, all of this lore was in the possession, and

it may fairly be assumed in the contemplation, of the District Judge, even if he did not detail all the reasons why a Maine lawyer would conclude that Maine law recognizes the privilege of a rival claimant.[1]

Although either not recognized or ignored by the petitioner's counsel, the District Judge also had in mind Maine's self-imposed limitations on answering certified questions. The decision must in at least one alternative be determinative of the litigation. *White v. Edgar,* 320 A. 2d 668 (Me. 1974); *Hiram Ricker & Sons v. Students Intl. Meditation Soc.,* 342 A.2d 262 (Me. 1975), app. dis., 423

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[1] The petitioner now asserts that the district judge refused to certify an additional question, whether petitioner was a "buyer in the ordinary course" as that phrase is used in the Maine Commercial Code, ME. REV. STAT. ANN. tit. 11, Sec. 9-307(1) (Supp. 1988) (effective Jan. 1, 1978). Neither the request nor the refusal is reflected anywhere in the District Court's careful recital of the case, and the Court of Appeals indicates that the demand for certification of the "buyer in the ordinary course" issue was made for the first time on appeal. (App. to petition, p. 21) Whenever he raised the issue, it is clear that petitioner is in no position to complain that the question was not certified. Had the Maine Court held that petitioner could not be a buyer in the ordinary course, that would have ended his claim. Even if the Maine Supreme Judicial Court had held that petitioner was such a buyer and had superior rights in the boat as such, its decision would not have determined whether the Bank had the state of mind requisite for loss of its privilege as a rival claimant. Quite the contrary, petitioner's present insistence that, as the petition puts it, "there is *no Maine authority*" (Petition, p 9, fn, emphasis in original) on the question demonstrates that the Bank must have lacked the knowledge or reckless disregard of its error in asserting a lien that at a minimum would defeat the privilege. Consequently, certification of that question would have been of no benefit to petitioner.

U.S. 1042; 2 Field, McKusick & Wroth, MAINE CIVIL PRACTICE, 249, 2d ed. 1970. The requirement was carefully discussed in his decision and in the circumstances of this case was an additional factor influencing and supporting the exercise of the trial court's discretion to refuse certification. The District Judge explained that, in view of the prevailing unanimity on the issues on which liability turned, the dispositive questions in the case were questions of whether the respondent had met the threshold showing required to justify summary judgment and whether the petitioner had produced any indication of rebuttal evidence. Pet. App. at 12-13. In view of these circumstances, it would be hard to find a case resting more comfortably "with the sound discretion of the federal court", *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974), and it would be hard to find a less appropriate "opportunity to pronounce on what factors are not to be taken into account in the certification decision." Pet. at 14.

2. Neither The Opinion Of The Court Of Appeals, Nor That Of The District Court, Reveals Any Real Disagreement With The Policy Of *Lehman Brothers v. Schein*.

Petitioner attempts to elevate the trivial certification request he urged on the Court of Appeals to a matter worthy of the exercise of this Court's supervisory powers by seizing and distorting beyond recognition a small piece of the lower court's opinion. After finding abundant reason to reject the request for certification that formed petitioner's main contention on appeal, the Court of Appeals noted that petitioner's request for certification

was "particularly inappropriate" because the federal court was his choice of a forum. Invoking this brief statement and a similar comment in *Cantwell v. University of Massachusetts*, 551 F.2d 879, 880 (1st Cir. 1977), where it was likewise not necessary to the decision,[2] petitioner declares that the First Circuit has made certification unavailable in a diversity case when requested by the plaintiff, and that this "policy significantly restricts the availability of certification in diversity cases." Pet. at 6. Petitioner goes on to accuse the Court of Appeals of rejecting "cooperative judicial federalism", creating a "substantial and unauthorized limitation on diversity jurisdiction", and pouncing on a bit of metaphor, of requiring a request for certification immediately after filing the complaint. Summarizing his request for relief, petitioner suggests that this Court declare "the fact that certification is requested by a plaintiff in a diversity action ought not in and of itself be grounds for denial" and that certification will not "turn on when a party may have requested certification". Pet. at 14.

The argument is pure bootstrap. Several of the circuits and commentators as well have noted that the plaintiff in a diversity case ought not to be asking for certification of questions that he/she chose to present to a federal court. According to Wright, Miller & Cooper,

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[2] In *Cantwell*, as in this case, the decision not to certify was too clear for argument. The plaintiffs in *Cantwell* sought permission to ask the Massachusetts Supreme Court to change its repeatedly expressed refusal to abolish judicially the doctrine of sovereign immunity, after the federal courts declined to just assume that the Massachusetts Court would reverse itself if given a chance.

FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d, Sec. 4248, at page 176,

> "Ordinarily a court will order certification on its own motion. It is in the best position to determine whether it feels confident in its reading of the state law. There is nothing to bar a party from suggesting the desirability of certification but the court should be slow to honor a request for certification from a party who chose to invoke federal jurisdiction."

Of course that is all the Court of Appeals was saying, and it is far from a policy, or even an indication, that the source of a request for certification is "in and of itself . . . grounds for denial." Petitioner would turn this mild criticism into a virtue, since he modestly admits choosing federal court with full knowledge of the state of Maine law on slander of title, with malice aforethought as it were. And he maintains that diversity jurisdiction, not only shields him from local prejudice, but becomes his sword by giving him a right to demand a federal hearing on the facts and both a federal and a state hearing on the law.

Neither the Court's opinion in *Lehman Brothers v. Schein*, 416 U.S. 386 (1974), nor Chief Justice Rehnquist's concurring remarks, supports any such restraint on the discretion of the district courts. On the contrary, as explained in Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d Sec. 4246, at p. 115:

> "His [Rehnquist, C.J.] opinion lends emphasis to the statement by the Court that the use of certification is in the sound discretion of the federal court, and that if a federal court believes it can resolve an issue of state law with available research materials already at

> hand, its determination should not be disturbed simply because a certification procedure existed but was not used."

Nor did the lower court's remark about a second bite at the cherry suggest more than a factor to be taken into account in deciding whether to grant a late request for certification. Rather than laying down a rule that requests must accompany the complaint, which petitioner notes would suggest a disingenuous choice of forum, the remark must be taken as a comment on the petitioner's request for certification of the "buyer in the normal course" issue, which was presented for the first time to the Court of Appeals. For reasons noted by the District Court and earlier in this Brief, the request was immaterial as well as untimely.

Neither the opinions below, nor those of any other circuit, suggest a disagreement with the policy of *Lehman Brothers v. Schein*, 416 U.S. 386 (1974), that is worth plenary consideration by this Court. "Where certification is available, it is not a device to be used indiscriminately." Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d, Sec. 4248, at p. 172. This was an appropriate exercise of discretion that avoided burdening the Maine Court with an utterly pointless certification, nothing more.

CONCLUSION

This case did not below and does not here present any issue worthy of serious consideration by this or any other Court. It does not even raise, let alone offer an

appropriate vehicle for deciding, a worthwhile issue as to the scope of the discretion of federal courts to certify or decline to certify questions of state law. On the contrary, petitioner would only be entitled to prevail if this Court were to decide that the district courts and the courts of appeal have no discretion whatever, but must certify any question tendered to them by a litigant, regardless how clear the answer may be. We submit that Petitioner's invitation to further prolong this wasteful exercise in litigation tactics should be declined.

Respectfully Submitted,

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